IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 17, 2008 Session

STATE OF TENNESSEE v. BARRY RONNELL SMELLEY

Direct Appeal from the Criminal Court for Davidson County
No. 2005-B-1408 Steve R. Dozier, Judge

No. M2007-01884-CCA-R3-CD - Filed February 24, 2009

A Davidson County Criminal Court Jury convicted the appellant, Barry Ronnell Smelly, of attempted first degree murder, especially aggravated burglary, and two counts of reckless endangerment with a deadly weapon. The trial court sentenced him to twenty-three years for the attempted murder conviction, fifteen years for the especially aggravated burglary conviction, and three years for each of the reckless endangerment with a deadly weapon convictions. The trial court ordered that he serve the sentences for attempted first degree murder and reckless endangerment with a deadly weapon consecutively to each other and concurrently with the sentence for especially aggravated burglary for an effective sentence of twenty-nine years. The trial court also ordered that the sentences be served consecutively to those the appellant received in a prior case. On appeal, the appellant challenges the sufficiency of the evidence and contends that the trial court sentenced him in violation of the dictates of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and State v. Gomez, 239 S.W.3d 733 (Tenn. 2007). Upon review, we affirm the appellant's convictions and sentences.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, Barry Ronnell Smelley.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At trial, the victim, Laquita Bell, testified that around 11:00 p.m. on August 11, 2004, she was lying in bed between her five-year-old and eight-year-old sons when the appellant kicked open the locked door of her duplex and shot her four times. The bullets struck her in the stomach, breast, upper chest, and arm. She explained that she and the appellant had grown up together, had dated for four years, and had been living together until two days before the shooting.

In the days preceding the shooting, Bell and the appellant argued frequently, and she told him that she did not want him living with her. Her mother placed the appellant's belongings on the porch of the duplex. Before lunch on the day of the shooting, the appellant came to the victim's duplex to get his clothes. The victim and the appellant argued, and, before leaving, the appellant told the victim that she was a "sitting duck." Initially, the victim did not take the threat seriously; however, she became concerned when the appellant repeatedly telephoned and relayed messages to her through her son. She changed the locks to her home.

The victim testified that around 11:00 p.m. on the night of the shooting, the appellant called her and told her to get the children out of the house because he was coming over. A short time later, she heard a knock on the door but did not answer. Shortly thereafter, she heard the door being kicked open and saw the appellant standing in the doorway of her bedroom. She said that he called her by a nickname and then shot her four times. While the appellant was shooting her, the victim tried to cover one of her sons who was asleep and tried to push her other son out of harm's way.

During cross-examination, the victim testified that she had talked with the appellant over the telephone since the shooting. She acknowledged that during one conversation with the appellant, she stated that he did not shoot her and that she did not know who shot her. She explained that those remarks were made very sarcastically. She testified that the appellant knew that he shot her and should have known the remarks were sarcastic.

The victim's mother, step-father, and sister lived in the other part of the duplex and rushed to help the victim after hearing the gunshots. Carolyn Williamson, the victim's mother, testified that she saw someone on the victim's porch after she heard the shots and that she chased him. Although she could see only his back, braided hair, and body build and could not see his face, she testified that she was certain that the appellant was the person she chased away from the victim's home on the night of the shooting. She said that she had known the appellant since he was seven or eight years old.

The victim's sister testified that she heard gunshots and ran to check on her sister and nephews but that she did not see anyone running from the porch. Earlier that day, she heard the appellant and the victim arguing and heard the appellant tell the victim that he was going to "get her." She went with the victim to purchase new door locks.

The victim's oldest son testified that he was in bed with the victim when she was shot. On the night of the shooting, he answered the telephone when the appellant called and asked to speak to the victim. Following the victim's instructions, he denied the request and hung up the telephone.

The appellant called back and told the victim's son that he was coming to the duplex. The victim's son fell asleep and did not awaken until after the shooting.

Sergeant Charles Harrison testified that he arrived at the scene of the shooting at approximately 12:20 a.m. At that time, the victim was bleeding but was conscious and alert. She told Sergeant Harrison that the appellant was the person who shot her.

The appellant testified and denied shooting the victim. He admitted that he and the victim had been arguing and that he called the victim the night of the shooting and told her that he was coming to see her. However, he said he never went to the victim's home that night because he had no way to get there. The appellant said that he and the victim argued because she had sold a car that did not belong to her. The appellant said that he had been holding the car as collateral for a loan he made to a friend and that the buyer of the car was upset with the victim because he wanted the title to the car or his money back.

Latrica Thompson, the appellant's fiancee, testified for the appellant. Thompson said that she listened to and recorded a telephone conversation between the victim and the appellant and that during the conversation, the victim said she did not know who shot her. However, Thompson admitted that during the same conversation she heard the victim accuse the appellant of shooting her and of trying to act as if he did not. She heard the victim tell the appellant that he knew what he had done.

II. Analysis

A. Sufficiency of the Evidence

On appeal, the appellant contends that the evidence is not sufficient to support his convictions. Specifically, the appellant contends that the statements the victim made during the telephone conversation with him were inconsistent with her trial testimony and that the victim's trial testimony is therefore "cancelled out" by the contradictory statements. He also asserts that there is insufficient evidence to sustain his convictions because the victim's trial testimony varied from her previous testimony. The State argues that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial

evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Tennessee law recognizes a rule of cancellation when a witness makes contradictory, sworn statements. Bowers v. Potts, 617 S.W.2d 149, 154 (Tenn. Ct. App. 1981). Simply put, the rule of cancellation provides that "'contradictory statements of a witness in connection with the same fact have the result of cancelling each other out.'" Id. (quoting Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 482 (Tenn. Ct. App. 1978). However, the rule only applies when both statements are sworn and when there is no corroboration for either statement and no explanation for the inconsistency. State v. Caldwell, 977 S.W.2d 110, 118 (Tenn. Crim. App. 1998); Taylor, 573 S.W.2d at 483; State v. Roger Dale Bennett, No. 01C01-9607-CC-00139, 1998 WL 909487, at *5 (Tenn. Crim. App. at Nashville, Dec. 31, 1998). In the instant case, the statements the victim made during her telephone conversation with the appellant were not under oath. Moreover, the victim explained that she was being sarcastic during the telephone conversation. The victim's mother corroborated the victim's identification of the appellant when she testified that she was certain that the appellant was the person whom she chased from the victim's porch moments after the shooting. The rule of cancellation is not applicable.

The appellant also cites inconsistencies in the details of the victim's prior testimony and trial testimony in support of his challenge to the sufficiency of the evidence. In her prior testimony and at trial, the victim identified the appellant as the person who shot her. The jury heard defense counsel impeach the victim using inconsistencies in her testimony about the color of the appellant's shirt on the night of the shooting, whether the victim could remember if she was wearing her glasses when she was shot, and other details about that night. Nevertheless, the jury accredited the victim's testimony and concluded beyond a reasonable doubt that the appellant was the person who burst into the victim's home and shot her four times as she lay in bed between her two sons. Ample evidence was introduced at trial to support the jury's conclusion.

B. Sentencing

The appellant contends that the trial court improperly applied enhancement factors that were neither admitted nor found by the jury, a violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and State v. Gomez, 239 S.W.3d 733 (Tenn. 2007), and that re-sentencing is required with respect to both the length of his sentences and the consecutive manner of service ordered by the trial court. The State contends that a remand is necessary for re-sentencing with respect to the length of the appellant's sentences because the trial court erroneously sentenced the appellant pursuant to the 2005 amendments to the Sentencing Reform Act of 1989 in violation of his ex post facto protections. The State further argues that the record supports the imposition of consecutive sentences. We agree with the appellant that the trial court violated the dictates of Apprendi and Gomez. However, based on our de novo review, we conclude that the sentences imposed by the trial court are warranted.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W. 2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

For offenses committed prior to June 7, 2005, sentencing was governed by prior law, which provided for "presumptive" sentences. The presumptive sentence was the midpoint in the range for Class A felonies and the minimum in the range for all remaining felonies. See Tenn. Code Ann. § 40-35-210(c), (d) (2003). Trial courts were to enhance and/or mitigate a defendant's sentence based upon the application of enhancement and mitigating factors. See Tenn. Code Ann. § 40-35-210(d), (e) (2003). In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), the United States Supreme Court concluded that the "'statutory maximum' for Apprendi [v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000),] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303, 124 S. Ct. at 2537; see also Gomez v. Tennessee, __ U.S. __, 127 S. Ct. 1209 (2007). In response to Blakely, our legislature amended Tennessee's sentencing scheme and eliminated presumptive sentences. The Compiler's Notes to Tennessee Code Annotated section 40-35-210 (2006) provide that

> for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

In the instant case, the appellant committed the offenses in August 2004 and was sentenced in January 2007. Therefore, the trial court was required to sentence him under the prior sentencing law unless the appellant executed a written waiver of ex post facto protections. There is no waiver in the appellate record, and we believe that the trial court sentenced the appellant under the prior sentencing law.[1]

[1]In its brief, the State incorrectly asserts that the trial court referenced enhancement factors using the numbering contained in the amended act. The sentencing hearing transcript reflects that only the State identified enhancement factors using numbers from the amended act, and that the trial judge actually quoted in part from the

(continued...)

At the sentencing hearing, the victim's mother testified, and the presentence report and certified copies of the appellant's prior felony convictions were introduced. In addition to several misdemeanor convictions, the appellant has a prior conviction for selling less than .5 grams of cocaine, a Class C felony; two prior convictions for theft greater than one thousand dollars, a Class D felony; and a prior conviction for attempted theft greater than one thousand dollars, a Class E felony. The certified copy of the amended judgment relating to one of the appellant's previous theft convictions reflects that the appellant violated the terms of probation and that his probation was revoked. An amended judgment for the drug conviction reflects that the appellant violated the community corrections sentence he was serving for that offense when he committed the offenses in this case.

The trial court sentenced the appellant to twenty-three years as a Range I offender for the attempted murder conviction, fifteen years for the especially aggravated burglary conviction as a Range II offender, and to three years for each of the reckless endangerment convictions as a Range II offender. The sentencing range for the appellant's conviction for attempted first degree murder was fifteen to twenty-five years with the presumptive sentence being the mid-point. See Tenn. Code Ann. §§ 40-35-112(a)(1); 40-35-210(c) (2003). The sentencing range for the appellant's especially aggravated burglary conviction was twelve to twenty years, and the range for his reckless endangerment convictions was two to four years with the presumptive sentences being the minimum in the range. See Tenn. Code Ann. § 40-35-112(b)(2) and (b)(5) (2003). In sum, the trial court enhanced the sentences for attempted first degree murder and especially aggravated burglary three years and enhanced the sentences for reckless endangerment one year. The trial court ordered that the sentences for attempted first degree murder and reckless endangerment with a deadly weapon be served consecutively to each other and concurrently with the sentence for especially aggravated burglary for an effective sentence of twenty-nine years.

With respect to the length of the appellant's sentences, the trial court noted the applicability of enhancement factors relating to the appellant's prior history of criminal convictions, his failure to comply with conditions of release as demonstrated by his prior probation violation, and his violation of the community corrections sentence he was serving at the time of the offenses in this case. See Tenn. Code Ann. § 40-35-114 (2), (9), and (14) (2003). Although the trial court noted that the appellant's possession of a weapon was inherent in his felony reckless endangerment convictions, it applied the weapon possession enhancement factor, Tennessee Code Annotated

---

[1](...continued)
prior act. When explaining that the appellant's community corrections violation could be used for enhancement, the court stated, "[T]he enhancing factors statute mentions bail, probation, parole, work release or any other type of release into the community under direct or indirect supervision of a local governmental authority or Department of Corrections." See Tenn. Code Ann. § 40-35-114(14) (2003). Under the amended act, the enhancement factor explicitly specifies "community corrections" status. Tenn. Code Ann. § 40-35-114(13)(E). The trial court's only reference to the amended act was in discussing probation when it mentioned that the appellant's sentence was "beyond the ten year probationary allowance for the Court to consider." See Tenn. Code Ann. § 40-35-403 (2003) (providing for probation eligibility for sentences of eight years or less).

section 40-35-114(10), to the sentences for attempted first degree murder and especially aggravated burglary.

The trial court's application of the weapon enhancement factor was error. Apprendi and its progeny prohibit the trial court from enhancing the appellant's sentences based upon facts, other than prior convictions, which have not been admitted by a defendant or determined by a jury beyond a reasonable doubt. Blakely, 542 U.S. at 301, 124 S. Ct. at 2536; Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 860 (2007); Gomez, 239 S.W.3d at 740. Regardless, standing alone, the appellant's extensive criminal history justifies the sentences he received, so the error is harmless. See State v. Larry Darnell Pinex, No.M2007-01211-CCA-R3-CD, 2008 WL 4853077, at *17 (Tenn. Crim. App. at Nashville, Nov. 6, 2008); State v. Mitchell Eads, No. E2006-02793-CCA-R3-CD, 2008 WL 2790434, at **10-12 (Tenn. Crim. App. at Knoxville, July 21, 2008). Moreover, the trial court's application of enhancement factors (9) and (14) were based upon certified copies of judgments showing the appellant's previous probation violation and the revocation of his community corrections sentence.

Finally, the appellant challenges the trial court's use of "non-criminal history" factors in ordering consecutive sentences. He contends that Apprendi requires that a jury make the factual findings necessary for the imposition of consecutive sentences. However, the Supreme Court recently rejected the same argument. Oregon v. Thomas Eugene Ice, ___ U.S. ___ , No. 07-901, 2009 U.S. LEXIS 582 (Jan. 14, 2009). The rationale of Apprendi does not apply to the decision to order consecutive sentences. Id.; State v. Allen, 259 S.W.3d 671, 689-90 (Tenn. 2008).

Based on our review, we agree with the trial court's decision to order consecutive sentencing in this case. Given the circumstances of the offenses and the appellant's criminal history, ample evidence supports the court's findings that the appellant is a dangerous offender and that the sentences imposed reasonably relate to the offenses and are necessary to protect the public from further misconduct by the appellant. See Tenn. Code Ann. § 40-35-115(b)(4); State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995).

III. Conclusion

Based upon the foregoing, we conclude that the trial court violated Apprendi when it determined the length of the appellant's sentences. However, upon our de novo review, we hold that the length of the appellant's sentences are nevertheless justified based on his criminal history and that the record supports the trial court's imposition of consecutive sentences. Accordingly, we affirm the judgments of the trial court.

_____
NORMA McGEE OGLE, JUDGE